No. 90-1386

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990.

ELI TARBELL, ANTHONY LAUGHING, and PETER BURNS, SR.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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(S1008—LC3-483)

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Petitioners hereby submit their Reply Brief in response to the Brief for the United States in Opposition ("Brief in Opp.") filed by Respondent United States of America.

Argument

At the outset it should be noted that respondent has mischaracterized the Questions Presented in the instant

Petition for a Writ of Certiorari in an attempt to justify their claim that this Court should not review this matter. However, a review of their Argument demonstrates that respondent concedes that the issues involved herein are indeed complex and important.

. . . as to 25 U.S.C. §232

Respondent has failed to advise this Court that the House Committee report considering H.R.6036 specifically indicated that only the courts can authoritatively and properly decide if the United States has retained Federal jurisdiction over the Indian reservations in New York State (H.R. Rep No. 2337, 83rd Cong., 2nd Sess. June 27, 1952, p. 3). Clearly, the instant case presents this Court with the opportunity to decide that important issue.

Respondent has not shown that this Court was incorrect when it previously stated that New York State's jurisdiction was in effect exclusive by virtue of 25 U.S.C. §232 (see Petition, p. 10).

Respondent has also failed to address its own prior waffling on the issue of the extent of 25 U.S.C. §232 (see Petition, p. 11). It seems readily apparent that respondent expects to use that position again when it suits its advantage in other proceedings. The issue of the full extent of 25 U.S.C. §232 should be resolved by this Court now.

. . . as to Indian Country.

Respondent claims that, in any event, their jurisdiction regarding 15 U.S.C. §1175 is unaffected by any determination as to 25 U.S.C. §232 due to the all inclusive extent to which 15 U.S.C. §1175 applies (Brief in Opp., pp. 11-12). However, respondent fails to note that all of the indictments relating to a violation of 15 U.S.C. §1175 referred only to

possession "within Indian Country", and not the other more expansive geographical area on which respondent now relies (JA-22a-23a, 27a).

Congress is free to reassert Federal jurisdiction over the St. Regis Reservation should it choose to do so. Therefore, there is no need for the courts to extend, on their behalf, the provisions of 18 U.S.C. §1955 to the St. Regis Reservation, since there is a mechanism in place for the regulation of gambling on those Indian lands (see Petition, p.14).

. . . as to the IGRA.

Petitioner has not claimed, contrary to respondent's assertion (see Brief in Opp., p. 13), that the IGRA (25 U.S.C. Chapter 29) preempted application of 15 U.S.C. §1175. Rather petitioners have shown that 15 U.S.C. §1175 does not apply to the St. Regis Reservation in New York by virtue of 25 U.S.C. §232, and because the area in question is not Indian Country (see Petition, pp. 14-18). If respondent's position is correct, as to the relationship of the IGRA and 18 U.S.C. §1955 (Brief in Opp., pp. 13-14), one can only speculate as to how Congress can on one hand prohibit gambling on Indian lands (18 U.S.C. §1955) while on the other hand allowing gambling on Indian lands (IGRA).

. . . as to the conflict between the 6th and 9th Circuit.

It is necessary for this Court to resolve the conflict between the Sixth Circuit (*United States v. Dakota*, 666 F.Supp. 989 (W.D. Mich. 1985), aff'd, 796 F.2d 186 (6th Cir. 1986)) and the Ninth Circuit (*United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981)). Resolution of that conflict will determine if the conduct in question, on Indian land, was or was not a

violation of state law for the purpose of 18 U.S.C. §1955. If it was not, then the convictions fail.

. . . as to the sentence.

The timing of the guilty plea, and the other charge to which Laughing pled guilty, were not factors that the courts below considered in justifying their denial of a reduction of sentence for acceptance of responsibility (U.S.S.G. §3E1.1(a)). As such, it is inappropriate for respondent to seek to justify the lower courts' action on these "grounds" (Brief in Opp., pp. 15-16). Laughing was allowed a conditional guilty plea based solely on jurisdiction challenges, and then when he continued to challenge that jurisdiction, he was improperly denied a reduction of his sentence for acceptance of responsibility.

Conclusion

For the reasons set forth above and in the Petition for Certiorari, this Court should review and reverse the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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